Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

APPEAL FROM
THE SUPREME COURT OF
THE STATE OF SOUTH CAROLINA

DOUGLAS GREENE
. . . . . Petitioner

V.

SOUTH CAROLINA ELECTION COMMISSION, THE SOUTH CAROLINA BOARD OF STATE CANVASSERS, THE AIKEN COUNTY ELECTION COMMISSION, THE AIKEN COUNTY BOARD OF CANVASSERS AND LAWANA R. MCKENZIE
. . . . . Respondents

PETITION FOR WRIT OF CERTIORARI

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DOUGLAS GREENE

October 7, 1994

QUESTION PRESENTED FOR REVIEW

Did the South Carolina Supreme Court interpret and apply election law in this case in a manner which is repugnant to the Constitution and/or Federal law, where, when qualified voters were subject to Registrar error, the poll manager was granted discretion to disenfranchise or not to disenfranchise these qualified voters, unaware of challenge ballot law, at his whim, without notice, without hearing and without record, and, in this case the poll manager exercised this discretion to disenfranchise qualified voters which could have affected the election?

LIST OF ALL PARTIES

DOUGLAS GREENE,
Petitioner

LAWANA R. MCKENZIE,
Respondent

MOSES MYERS,Chairman
Aiken County Election Commission
Respondent

J. LYNN MCCANTS,Executive Director
South Carolina Election Commission
Respondent

WILLIAM B. DEPASS, JR.,Chairman
State Board of Canvassers
Respondent

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OPINIONS BELOW

The Opinion of the State of South Carolina Supreme Court affirmed the decision of State Board of Canvassers which upheld the decision of the Aiken County Board of Canvassers upholding the election results in the race for Aiken County Council seat for District 3.

JURISDICTION

The certiorari jurisdiction of this Court is invoked on the grounds that the South Carolina Supreme Court (State Court) has interpreted and applied a body of state election law with respect to Registrar error, challenge ballots, and poll manager discretion, in a manner which grants the poll manager authority to disenfranchise, or not to disenfranchise qualified voters, unaware of challenge ballot law, at his whim, without notice, without hearing and without record, which is repugnant to and in violation of the Constitution and federal law, and creates conflict between state law and federal law which has not been, but should be settled by this Court. Jurisdiction in the Supreme Court of the United States is invoked under 28 U.S.C. Section 1257.

STATEMENT OF THE CASE

This Appeal and Petition arises out of a challenge to a special election for Aiken County Council District 3. On April 27, 1993 the Aiken County Council District 3 election was conducted and the Aiken County Board of Canvassers declared Lawana R. McKenzie, the Democratic candidate, as the winner over Douglas Greene, the Libertarian candidate. Ms. McKenzie has been sworn into office.

The Aiken County Registration and Election Commission reported that McKenzie received 628 votes and that Greene received 623 votes.

The State Board upheld the decision of the County Board by a vote of 3-1. The dissenter filed a strong dissenting opinion.

On October 21, 1993 the Court issued a Writ of Certiorari to review the Order of the South Carolina Board of State Canvassers, dated June 15, 1993. The Writ of Certiorari was granted. An Order was issued June 20, 1994 upholding the election. A petition for rehearing was timely filed and the petition was dismissed by Order dated July 13,1994.

STATEMENT OF FACTS

Petitioner Douglas Greene was the unsuccessful, Libertarian candidate for the Aiken County Council District 3 seat in the April 27, 1993 election. The margin of victory of the Democratic candidate, Lawana McKenzie was five (5) votes. Many of the Precincts were split into two County Council Districts. Where

the Precincts were split into two County Council Districts, voters in both Council Districts voted at the same Precinct location. In split Precincts, the voters of both Districts are listed alphabetically on the same Precinct list. The same poll manager supervised the election, and issued ballots for both County Council Districts within a split Precinct.

Douglas Greene introduced the sworn affidavits of eleven (11) voters from split precincts, who stated they were not allowed to vote in District 3. One of these Affiants was the husband residing with his wife in District 3. The wife was permitted to vote in District 3, but the husband was required to vote in District 2. In its Order, the State Board of Canvassers found that:

> The record reflects that no challenged ballots were cast in District 3. ... Unfortunately, the affidavits and the record reflect that all of these voters were challenged by the poll managers and each voter subsequently voted in the District they were told. (Order, State Board p. 2).

The State Court found that the following facts are not in dispute:

> At least six qualified voters presented themselves at the Precinct to vote. Each of these voters was listed on the official voter registration roll

as living in District 2. These voters were allowed to vote in the precinct elections, but they were not allowed to vote in the District 3 County Council election. (Order, State Court p. 20 & 21).

SUMMARY OF ARGUMENT

The Supreme Court of the State of South Carolina has interpreted a body of election law and decided a question of voters rights in a manner which is repugnant to the Constitution and/or federal law, in that when Registrar error was at issue, the state resolved a conflict between voters rights, and the right of the state to conduct open, orderly, and expeditious elections, in favor of the state, in a manner which expedited the election by eliminating a challenge ballot hearing, and in the process granted the poll manager the discretion to disenfranchise, or not to disenfranchise qualified voters, unaware of challenge ballot law, at his whim, without notice, without hearing, and without record. The poll manager's exercise of this discretion, approved by the State Court, could have affected the outcome of this election. The exercise of similar discretion by poll managers could affect the outcome of all close elections in the future. The Libertarian candidate has called into question more ballots from disenfranchised voters than the margin of victory for the Democratic candidate. The election should be set aside and a new election ordered.

ARGUMENT

The evidence before the State Court indicated that each of the eleven Affiants who presented themselves at the polls as voters qualified to vote in District 3, were challenged by the poll managers because the official voter registration list indicated that they were registered in a District other than District 3. Thereafter the voters were instructed to, and did cast a regular ballot in the District assigned to them by the Registrar under substantially identical circumstances, which are generally described step by step as follows:

(1) In each case there was a discussion between the voter and poll manager as to District of residence; (Order State Board, Dissenting Opinion, p. 1)

(2) The voters informed the poll manager that they resided in District 3; (Affidavits of 11 voters)

(3) The official voter registration list indicated that the voter resided in a District other than District 3; (Official Registration List in evidence)

(4) The State Board found that the Affidavits and record indicated that the poll manager challenged each voter, but The State Court found that the Affidavits did not evidence that the challenge by the poll manager was sufficient to require a challenge ballot under the statute; (Order State Board, p. 2, Order State Court, p. 22)

(5) The poll manager refused each voter a regular ballot in District 3; (Order State Board, Dissenting Opinion p. 1)

(6) There is no evidence that any voter requested a challenge ballot in District 3;
(7) There is no evidence that any voter was informed of his right to receive a challenge ballot;
(8) There is no evidence that any voter was aware of his right to receive a challenge ballot;
(9) There is evidence, however, that each poll manager received instruction in the challenge ballot law;
(10) The poll manager instructed each voter to cast a regular ballot in the District as assigned by the Registrar; (Order State Board, p. 2)
(11) South Carolina Voter Registration cards do not indicate District assignment and there is no requirement to notify a voter if election officials change voter's District.(S.C. Code Ann. § 7-7-960 (Supp. 1993)
(12) The State Court found that applicable law ...." requires the voter or someone on the voter's behalf to "insist" on casting a challenge ballot", (the decision appeared to turn on this interpretation of law); (Order State Court, p. 22)
(13) The State Board found that no challenge ballots were cast in District 3; (Order State Board, p. 2)
(14) Election officials determined at least Six of the voters addresses on the official voter registration list used by the District 3 poll managers, were in fact within District 3, but were listed by the Registrar (on that same list) in other Districts; (Order State Board, Dissenting Opinion, p. 1)

(15) The State Court also found that at least Six of these voters were qualified to vote [in District 3]; (Order State Court, p. 20)

(16) Each voter was issued a regular ballot in accordance with the District assigned to him by the Registrar; (Order State Board, p. 2)

(17) Each voter cast the regular ballot issued to him. (Order State Board, p. 2)

The State Court's decision in this case upheld the election, when sufficient votes were at issue to set aside, where Registrar error was at issue, and where the poll managers decision disenfranchised a sufficient number of qualified District 3 voters to affect the election result. In this case the State Court approved the poll manager's discretion to disenfrachise, where the facts indicate that at least six District 3 voters were issued regular ballots in District 2, and when the Affidavits of these voters indicate that they told the poll manager they resided in District 3 before the ballots were cast. The State Board found that the affidavits and the record indicated that each voter was challenged by the poll manager. The State Court found that the Affidavits of the voters did not indicate that the poll manager's challenge to the voters was sufficient to require the poll manager to issue challenge ballots under the statute, where these voters or someone on the voter's behalf failed to insist on casting challenge ballots. (Order State Board, p.2, Order, State Court, p. 22)

The Court's decision in Hill v. S.C. Election Commission, 304 S.C. 150, 403

S.E.2d 309 (1991) upheld that election, when sufficient votes were at issue to set aside, where identical Registrar error in District assignment was at issue, and where the poll manager's decision under identical facts did not disenfranchise the qualified voters. The facts indicate that the poll manager in Hill exercised his discretion in the opposite manner and chose to issue the 40 voters regular ballots where they resided, and in Districts different from that assigned by the Registrar.

TO DISENFRANCHISE OR NOT TO DISENFRANCHISE

In the case of Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991) , the petitioner [Roger Hill] won the District 3 seat by thirty-seven (37) votes, but the election was set aside by the South Carolina Board of State Canvassers (State Board) because forty (40) persons who were identified as being registered in the wrong District were given regular ballots in another District, which created an "over vote" in that District.

Roger Hill appealed to the South Carolina Supreme Court, which reversed the Order of the State Board, ruling that Taylor's protest was barred because no challenge was raised to these "over votes" at the time the ballots were cast. It is clear from Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991)that an election will not be set aside where Registrar error identical to this case is at issue, but where the poll

manager exercises his discretion in a different manner than in the instant case, so as to give a voter a regular ballot in a District of his residence. When faced with Registrar error, the poll manager in Hill exercised his discretion **NOT TO DISENFRANCHISE** the forty voters, and issued them regular ballots in another District. The election was upheld.

In Hill the Court apparently anticipated the factual situation in the instant case, and issued instructions.

> "The crux of the Respondent, George Taylor's protest was that in two (2) Precincts there were more ballots cast for District 3 Seats than there were District 3 voters indicated on the voter registration list for those precincts."

The Court commented further:

> "we see no reason why a challenge could not have been made at the time a voter was given a ballot for a different district than the one which appeared on the registration list"....and [H]ad a challenge been raised by Taylor at the time a ballot was dispensed, there would be no need to make assumptions of any kind, since the challenged ballot would have been segregated and a record made of the determination of the challenge."

In the instant case the poll manager followed only half of the instructions given by the Court in Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991). The State Board determined from the Affidavits and the record that the poll manager did challenge each voter. However, the poll manager failed to follow the second part of the Court's instructions from Hill in that no challenge ballots were issued after the poll manager challenged the voter. Even though the voters in the instant case timely identified the Registrar error, the District 3 voters were issued regular ballots in the incorrect District, and instructed to vote in accordance with the erroneous Registrar list. In doing so the poll manager exercised his discretion **TO DISENFRANCHISE** these qualified voter, who were the subject of Registrar error identical to that of the voters in Hill.

UNAWARE OF CHALLENGE BALLOT LAW

In Hill the Court found no error when the poll manager issued regular ballots in different Districts, to forty voters who were the subject of Registrar error, without requiring the voter insist on casting a challenge ballot. In the instant case, where Registrar error was timely brought to the attention of the poll manager, the Court would not interfere with the exercise of discretion by the poll manager, who, after challenging the voter, refused to issue the voter a challenge ballot, ruling that state law required the voter or someone on the voter's behalf to "insist" on casting

a challenge ballot.

Requiring the voter, who is the subject of Registrar error, to know election law with specificity, and to have presence of mind to "insist" on casting a challenge ballot by name to receive one, requires the voters, subject to Registrar error, to exhibit specific knowledge, not required of other voters, the difficulty of which far exceeds that previously declared to be an unconstitutional test or device. (Voting Rights Act, 42 U.S.C. section 1973) Under the State Court's interpretation of the challenge ballot law, the poll manager may exercise his discretion with impunity, to disenfranchise or not to disenfranchise any qualified voter, who is the subject of Registrar error, and who is **UNAWARE OF CHALLENGE BALLOT LAW**, with sufficient specificity to understand that he is entitled to a challenge ballot, to initiate the challenge, and also have the presence of mind to "insist" on casting a challenge ballot once he is challenged by the poll manager.

AT HIS WHIM

In Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991) the Court refused to overturn the election where the margin of victory was 37 votes and 40 votes were called into question by Registrar error. The Court apparently found it acceptable for the poll manager to use his discretion to find Registrar error, and to use his discretion to issue those forty voters, he found to be listed in the incorrect District, regular ballots

in another District, without challenging the voters or requiring the voters to insist on a challenge ballot.

The instant case represents the opposite end of the "discretion spectrum" when identical Registrar error is at issue. In this case the Court refused to set aside the election where the poll manager exercised discretion to force voters, challenged as to District of residence, to strictly comply with the erroneous Registrar's list, and the discretion to issue voters regular ballots in Districts in which the voters told the poll manager they did not reside.

Between these extreme positions of these two cases, is an entire spectrum in which the poll manager can exercise discretion, **AT HIS WHIM**, to either disenfranchise qualified voters, or not to disenfranchise qualified voters.

WITHOUT NOTICE

It is clear in the instant case that the voters were aware that the poll manager was exercising discretion to force them to vote in a District where they told him they did not reside. There is no evidence that the poll manager notified the voters as to their rights under the challenge ballot law, and there is no evidence that any of the voters were aware of their rights.

In the Hill case, "[T]aylor concedes no challenges were made to the ballot at the time they were cast". In Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991) it was the poll manager who recognized the Registrar error, and on

his volition issued different ballots. There is no indication that the voters in Hill were notified, or that they were even aware, that they were being issued ballots in conflict with the Registrar's official list.

The poll manager in Hill and in the instant case simply issued these voters, subject to Registrar error, regular ballots **WITHOUT NOTICE** of their right to receive a challenge ballot.

WITHOUT HEARING

In the instant case, and in Hill the poll managers exercised their discretion to issue the voters, subject to Registrar error, regular ballots rather than challenge ballots, thus expediting the election by eliminating the time consuming challenge ballot hearing and concluding the matter **WITHOUT HEARING.** The State Court, in refusing to set either election aside, affirmed the finality of the election and affirmed the exercise of discretion of the poll managers in expeditiously obtaining election finality.

WITHOUT RECORD

In the instant case and in Hill the poll managers exercised their discretion to issue the voter a regular ballot rather than a challenge ballot. The issuance of the regular ballot permits the poll manager to exercise his discretion **WITHOUT RECORD** for review.

REPUGNANT TO THE CONSTITUTION AND FEDERAL LAW

THE CONSTITUTIONAL AND STATUTORY RIGHTS OF A VOTER ARE VIOLATED BY:
(A) REQUIRING THE VOTER TO USE SPECIFIC STATUTORY LANGUAGE TO OBTAIN A CHALLENGED BALLOT;
(B) SETTING A DISCRETIONARY DEGREE OF "INSISTENCE" IN ORDER FOR THE VOTER TO BE OFFERED A CHALLENGED BALLOT; AND
(C) PERMITTING THE POLL MANAGER TO EXERCISE DISCRETION TO DETERMINE THE QUESTION OF REGISTRAR ERROR AT THE POLLS WITHOUT CREATING A RECORD FOR REVIEW, AND WITHOUT A HEARING.

In cases which involve the right of suffrage, as this case does, a modified form of strict scrutiny is applied. Strict scrutiny is a shorthand way of saying that where fundamental rights (or a suspect class) are involved, the state can infringe upon them only by a showing of a compelling state interest promoted by the least restrictive means. Prior to Anderson v. Celebrezze, 460 U.S 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), commentators, e.g. Tribe, Constitutional Law, were puzzled as to the actual standard used by the court. While the cases used the term "strict scrutiny", actual practice varied. These cases involve both fundamental rights - the right to vote, the right to associate and petition - as well as compelling state interests - the interest in conducting free and open elections. So

Anderson may be correctly described as either a balancing test or as strict scrutiny. But it is not to be confused with lower level balancing tests (of "arbitrary and capricious" versus "rational basis".)

Anderson sets out a four part test which has been adopted as the norm for analysis of First Amendment suffrage issues. Anderson was a ballot access case, but the paradigm is widely applied to suffrage cases.

First, the character and magnitude of the rights at stake must be assessed.

Second, the extent to which the practice, regulation, or statute infringes on the rights must be considered.

Third, the state must set out specifically what compelling interests are at issue, and these must be weighed and balanced against the rights.

Fourth, evaluating the extent to which the regulations are narrowly tailored so as to advance the compelling interests by the least restrictive means is the final step.

Subsequent cases have sometimes relaxed this fourth step where the rights infringements found in steps one and two have been minimal, while other cases have continued to strictly scrutinize the means-ends relationship in each case. Norman v. Reed, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992). We need not enter that fray here, since here where voters were prevented from voting in their district of residence and for the party of their choice the infringement on suffrage is substantial rather than minimal.

Whether to apply the Anderson test,

or some other version of strict scrutiny, is a case of first impression in South Carolina as to election challenge cases. Knight v. Board, 297 S.C. 55, 374 S.E.2d 685 (1988), is not actually a strict scrutiny case, although it uses that term. Knight actually concerned whether statutes, involving absentee voting, should be strictly construed. That this is so can be verified by reference to the cases cited in Knight: Weichelmann v.City of Glencoe, 200 Minn. 62, 273 N.W. 638 (1937),Davis v.Board of Education of Beaufort County, 186 N.C. 227, 119 S.E. 372 (1923),and Hilliard v. Park,212 Tenn.588, 370 S.W.2d (1963), each of which dealt with strict construction, which is an entirely different line of inquiry.

Where equal protection violations are alleged, as here, the cases and commentators are split as to whether to apply Anderson or a more traditional strict scrutiny analysis. See Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992), and New Alliance Party v. Hand, 933 F.2d 1568 (11th Cir. 1991) which raised but does not decide the issue of interplay between Fourteenth and Fifteenth Amendment review.

Shaw v. Reno, 61 U.S.L.W. 4818, 1993 U.S. Lexis 4406, reaffirms that strict scrutiny is the appropriate standard.

When election officials interpreted the challenge ballot law to require the voter to specifically ask for a challenged ballot in order to receive one and denied all District 3 residents challenged ballots because none asked for a challenged ballot, they violated S.C. Const. Art 1 § 1 , § 3 and § 5; Art 2 §

1, § 2 and § 4, Federal Voting Rights Acts and the U.S. Constitution.

Right of suffrage is a constitutional right vested in those persons who possess qualifications prescribed by Constitution, such right cannot be denied or abridged by legislative enactment; however, it is a right that legislature may regulate...to any extent not expressly or implicitly prohibited by Constitution. State ex rel. Edwards v. Abrams, 270 S.C. 87, 240 S.E.2d 643, 645 (1978)

Legislature's authority to require registration of voters does not empower it to modify or nullify citizen's constitutional right to vote. Voter registration laws must be...construed liberally and favorable to right to vote. A voter's failure to perform an act prescribed by election statute does not deprive him of privilege of voting, unless statute plainly and clearly requires such result by expressprovision or necessary implication. Funkhouser v. Landfried, 124 W. Va. 654, 22 S.E.2d 353, 356 (1942)

Election officials failure and refusal to offer a challenged voter the right to vote a challenged ballot and thereafter instructing the voter to vote in a District not his residence is violative of the S.C. Constitution which provides that every citizen ... shall be entitled to vote in the precinct of his residence ... (S.C. Const. Art. 2 § 4.)

When election officials challenged voters and determined the question as to the challenge during the election without a hearing they violated S.C. Cons. Art. 2 § 1 which provides that the right of

suffrage shall be protected ... from improper conduct.

An unconstitutional statute is in reality no law. The right of suffrage is a political right, not a property or civil right. The State Legislature has power to prescribe reasonable regulations as to how qualifications shall be determined. Provided that it does not deny the right of suffrage by making the exercise of such right so difficult or inconvenient as to amount to a denial of the right to vote. Franklin v. Harper, 205 Ga. 779, 55 S.E 2d 221, 229 (1949)

Permitting poll managers or supervisor of elections, to decide on the degree of "insistence" that each voter must demonstrate in order to obtain a challenged ballot and exercise his constitutional right of suffrage is unconstitutional, in that it denies voters equal protection and equal right to cast their ballot for the person of their choice. (U.S. Constitution, Article XIV)

The Voting Rights Act section 208, 42 U.S.C. section 1973aa, in defining "test and device", provides that:

(a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this section, the term "test or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand or interpret any matter, (2) demonstrate any educational

achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Requiring voters to know specific statutory provisions or specific statutory language in order to obtain a challenged ballot is clearly an illegal "test or device" under the Voting Rights Act.

McKenzie argues that Article 2 Section 4 of the State Constitution was not violated and that the poll managers "endeavored to preserve this very section and to ensure that voters voted only in the precinct where they actually resided". (Return, Board p.15) McKenzie apparently is confusing "residence" with "registration". The actions of the poll managers clearly indicate they made the voters vote where they were erroneously registered, not where they actually resided, and, further, denied the voters their statutory right to prove their District of residency through the challenged ballot procedure.

The State further alleges that the actions of the poll managers in requiring a voter to know specific statutory language in order to obtain a challenged ballot, (Return, Board p. 10), does not constitute a "test or device" under the Voting Rights Act. On the contrary, this requirement falls squarely under the definition of "test or device" quoted by the State:

> " ...any requirement that a person as a prerequisite for voting...(1) demonstrate the ability to read, write,

> understand or interpret any matter, and (2) demonstrate any educational achievement or his knowledge of any particular subject...[emphasis added] (Return, Board p.16,)

The State and McKenzie rely extensively on Hill v. S.C. Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991) and Fielding v. S.C. Election Commission, 408 S.E.2d 232 (1991). Hill and Fielding both turn on the fact that challenges were not made at the polls. This case at bar is distinguishable, as challenges were made, by the poll managers in Precincts 15, 51 and 59 and by a poll watcher in Precinct 8. Hill and Fielding both involve illegal votes, which were not challenged before being cast, whereas this case involves votes, which were timely challenged prior to being cast. McKenzie admits that the instant case is distinguishable from Hill : "Unlike Hill where the "... voter was given a ballot for a different district than the one which appeared on the registration list [,]" here the voter was given a ballot for the actual district in which he was registered." (Return, Board p.3), but misses the central point: that the voters gave the correct addresses of their residency to the Registrar and the Registrar placed them in incorrect Districts.

Hill and Fielding found that a challenge must be timely and Trapp v. South Carolina Board of State Canvassers, 273 S.C. 163, 255 S.E.2d 670 (1979) found that the proper application of the

challenged ballot laws by election officials was mandatory.

In the facts of this case, where voters' names do not appear on the precinct list for the District of their residence, and that fact was brought to the attention of the poll managers before the ballot is cast, the mandatory challenged ballot procedure is the guarantee that the voter will not be disenfranchised through official error when, as in this case, the poll manager refuses to allow the voters to cast a regular ballot in the district of their residence.

CONCLUSION

Based upon the argument and authority presented, the Petitioner respectfully submits that the decision of the South Carolina Supreme Court and the body of South Carolina election law upon which it is based is repugnant to the United States Constitution and violates the Federal Voting Rights Act. The April 27, 1993 election for Aiken County Council District 3 should be declared void and a new election held.

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October 7th, 1994

CERTIFICATE OF SERVICE

I, James L. Leslie, Jr., Esquire, attorney for the Petitioner Douglas Greene, do hereby certify that I have served the foregoing Petition for Writ of Certiorari , by depositing copies of same in the United States Mail, postage prepaid, with return receipt requested, on or before the 7th day of October, 1994, addressed to the attorneys of record and parties as follows:

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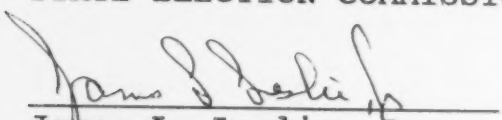
BOARD OF CANVASSERS AND
STATE ELECTION COMMISSION



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Counsel of Record

Appendix A

AIKEN COUNTY
REGISTRATION & ELECTION COMMISSION
736 Richland Avenue West
AIKEN, SOUTH CAROLINA 29801
803-642-1528
MAY 6, 1993

ACCOUNT OF COMMISSIONERS OF AIKEN COUNTY SOUTH CAROLINA

GENERAL ELECTION HELD ON APRIL 27, 1993 IN AIKEN COUNTY

APPEAL HEARING FOR COUNTY COUNCIL DISTRICT #3

WE, EACH ONE FOR HIMSELF, DO HEREBY CERTIFY THAT WE HAVE HEARD THE APPEAL FOR COUNTY COUNCIL DISTRICT #3 FILED BY DOUGLAS GREENE. WE FIND THAT THERE IS **NOT SUFFICIENT** EVIDENCE OF ELECTION LAW VIOLATIONS TO UPHOLD THE APPEAL.

WE THEREFORE DENY THE APPEAL BY DOUGLAS GREENE AND UPHOLD ELECTION AS CERTIFIED ON APRIL 29, 1993.

SIGNED AND ENTERED BY:
MOSES MYERS, COMMISSIONER;
ARLENE LAYMAN, COMMISSIONER;
FLORIA HARRIS, COMMISSIONER;
BEN WATSON, COMMISSIONER;
DAVID NIX, COMMISSIONER;
DENTON T.JOHNSON, EXECUTIVE DIRECTOR

(Not Signing:
MELANIE HUTTO, COMMISSIONER;
ALICIA BROOKS, COMMISSIONER)

Appendix B

STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF STATE CANVASSERS

Douglas Greene, Appellant	)	
vs.	)	ORDER
Lawana R. McKenzie, Respondent	)	
IN RE: Aiken County Council District 3 Seat April 27, 1993	)	

This matter is before the Board on appeal from the decision of the Aiken County Board of Canvassers to deny the protest of Appellant.

Appellant, Douglas Greene, was the unsuccessful candidate for the Aiken County Counvil, District 3 Seat in the April 27, 1993 election. The Aiken County Registration and Election Commission reported that the Appellant received 623 votes and the Respondent, Lawana R. McKenzie, received 628 votes. On May 3, 1993, the Appellant filee a protest of the election. The protest hearing was held by the Aiken County Board of Canvassers on May 6, 1993. The County Board determined that there was insufficient evidence of election law violations and denied the protest. The Appellant timely filed an appeal of the decision to this Board.

An appeal hearing was held before this Board on May 12, 1993. The Board reviewed the record and requested additional testimonies from Denton Johnson, Executive Director of the Aiken County Registration and Election Commission and Frances Pennington, staff assistant to Mr. Johnson.

The Appellant's writen protest contained five grounds to overturn the election. Of the five grounds, two related to the allegations that approximately thirteen voters were not alowed to vote in District 3. The Appellant introduced the sworn affidavits of eleven voters who stated they were not allowed the vote in District 3. Appellant argued that at least thirteen voters went tothe poll in their precincts tovote in District 3; that the poll managers challenged the voters qualifications to vote in District 3 based on their residence; that the voters insisted on voting in District 3; that the poll managers continued to refuse the voters the right to vote in District 3 and failed to issue the voters achallenged ballot; that as a result of the poll managers failure the issue the challenged ballots, these voters were deprived of their right to vote in District 3; and that the number of votes in question could have affected the outcome of the election.

The record reflects that no challenged ballots were cast in District 3. The record also reflects that of the eleven voters who presented affidavits, not one of them testified at the hearing before the county board. Consequently, this Board must rely on the affidavits and the record below. Unfortunately, the

affidavits and the record reflect that all of these voters were challenged by the poll managers and each voter subsequently voted in the District they were told. There is no evidence that the voter, when challenged, refused to vote. There is noevidence that the voter, when challenged, insisted in voting in District 3 and were refused a challenged ballot.

The Appellant has failed to meet the burden of proof required to substantiate the allegations. Likewise, there is insufficient evidence to substantiate the remaining allegations or that the the allegations, if proven, would have affected the outcome of the election.

The Protestant has the burden of proof in an election contest. As was stated in Fielding v. South Carolina Election Commission, 408 S.E. 2d 232 (1991):

> (e)very reasonable presumption is favor of sustaining a contested election will be employed and irregularities which do not appear to have affected the result of an election will not be allowed to overturn it.

See also Berry v. Spigner, 226 S.C. 183, 189, 84 S.E. 2d 381 (1954); Drawdy v. South Carolina Democratic Executive Comm., 271 S.C. 415, 417, 247 S.E. 2d 806 (1978).

Additionally, an election will not be overturned unless the errors would affect the outcome of the election. Drawdy, supra, at 421; State v. Ham, 275 S.C. 369, 373, 271 S.E. 2d 316 (1980).

The decision of the Aiken County Board of Canvassers is upheld and the Respondent, Lawana R. McKenzie, is

declared the duly elected candidate for the office of Aiken County Council District 3.

AND, IT IS SO ORDERED.

SIGNED and entered by William B. DePass, Jr.; Deborah B. Cureton; Chip T. Bradley

Columbia, S.C.
June 15, 1993

Dissenting Opinion:

Having not concurred with the majority of the Commissioners, I am submitting the following dissenting opininion:

Based upon information presented to the S.C. Board of Canvassers, there were major flaws in the Aiken County Council District #3, County Council race held April 27, 1993. In my opinion, these flaws could have affected the outcome of this election.

The difference in the votes was only 5 votes. Mr. Green, the loser, received a total of 623 votes and Ms. McKenzie, the winner, received a total of 628.

During testimony, Mr.Green presented affidavits from eleven voters declaring that they went to precinct #59 with the intentions of voting in the County Council District #3 race. However, upon their arrival at the Precinct, the poll manager told these individuals that they did not reside in District #3. These voters were then told that they must vote in District #2.

Several days after the election, it was determined by the Aiken County

Registration and Election Commission, that at least 6 of these voters did indeed live in District #3 where they had first attempted to vote. Of the remaining 5, the Aiken County Commission determined that 2 did not live in District #3. At the time of this hearing, no determination had been made as to the true residence of the remaining 3 voters.

The difference in the vote total was only 5 and we have evidence that at least 6 voters attempted to vote in District #3, but the poll managers would not allow them to vote in District #3. Following the directions of the poll managers, these 6 voters voted incorrectly in District #2. These 6 voters could have affected the outcome of the election.

Furthermore, it is my opinion that since there was some uncertainty and discussion as to the proper residency, before the ballot was cast, the poll manager should have offerred a challenge ballot to these voters. Several of my fellow commissioners offer that the discussions between the poll managers and voters was not heated enough. They contend that these voters should have been more demanding. Again, I disagree. A poll manager is an authority figure with the power to have individuals removed from the precinct and arrested. Most voters are reluctant to incessantly argue with a poll manager. I do not believe that a voter has to be overbearing, boisterous, or execssively agressive, in order to be afforded all opportunities to vote freely, correctly and unmolested.

Therefore, because of the above discrepancies, I am not sure of the intent

of the majority of the voters in Council District #3. Consequently, in my search for the truth I felt obliged to vote to grant the appeal and order a new election.

Roger Leaks, Jr.

June 15, 1993
Columbia, S.C.

Appendix C
THE STATE OF SOUTH CAROLINA
In the Supreme Court

Douglas Greene, Petitioner

v.

South Carolina Election Commission, The South Carolina Board of State Canvassers, The Aiken County Election Commission,The Aiken County Board of Canvassers and Lawana R. McKenzie, Respondents.

Appeal from Aiken County
South Carolina Board of Canvassers
William B. DePass, Jr., Chairman

Opinion No. 24101
Heard April 5, 1994-Filed June 20, 1994

AFFIRMED

James. L. Leslie, Jr., of Irmo, for petitioner

T. Travis Medlock, Attorney General; Edwin E. Evans, Chief Deputy Attorney General; Treva G. Ashworth, Deputy Attorney General, all of Columbia, for respondents South Carolina Election Commission and The State Board of Canvassers.

Dwight F. Drake and Carey T. Kilton, both of Nelson Mullins Riley & Scarborough, of Columbia, for respondent Lawana R. McKenzie

Robbin Stewart, of Kansas City, MO; and David L. Floyd, of North Augusta, both for Amicus Curiae

---

TOAL, A.J.: Douglas Greene ("Greene") appeals the decision of the State Board of Canvassers upholding the election results in the race for Aiken County Council seat for District 3. We Affirm.

FACTS

Greene was the unsuccessful Libertarian candidate for the Aiken County Council, District 3 seat. The official vote total was 628 votes to 623 votes. Greene lost the election by 5 votes.

Greene challenged the election results. A hearing was held before the Aiken County Board of Canvassers. At the hearing, eleven affidavits of registered voters were entered into evidence. All of the affidavits stated that the voters presented themselves at the poll but the poll manager did not allow them to vote in the District 3 County Council election. All of the voters were listed on the official voter registration roll as eligible to vote in District 2. None of the voters were listed as eligible to vote in the District 3 election. Several days after the election, the Aiken County Registration and Election Commission determined that at least 6 of the voters listed as eligible to vote in District 2 actually lived in District 3.

The Aiken County Board of Canvassers, finding no error in the conduct of the election, voted to sustain the result. Greene appealed to the South Carolina Board of Canvassers. The South Carolina Board of Canvassers found Greene failed to

produce any evidence that the "voters when challenged insisted in voting in District 3 and were refused a challenged ballot." We agree.

LAW/ANALYSIS

> The scope of appellate review of the State Board's order "is limited to corrections of errors of law; findings of fact will not be overturned unless wholly unsupported by the evidence." *Knight v. State Board of Canvassers*,297 S.C. 55,57,374 S.E.2d 685 (1988); *Simms V. Hamm*,275 S.C. 369,271 S.E. 2d 316 (1980); *Berry v. Spigner*,226 S.C. 183, 84 S.E. 2d 381 (1954). Every reasonable preseumption in favor of sustaining a contested election will be employed and irregularities or illegalities which do not appear to have affected the result of the election willnot be allowed to overturn it.

Fielding v. South Carolina Election Commission, 305 S.C. 313, 317, 408 S.E. 2d 232, 234 (1991).

The facts are not in dispute. At least six qualified voters presented themselves at the precinct to vote.Each of these voters was listed on the official voter registration roll as living in District 2. These voters were allowed to vote in the precinct election, but they

were not allowed to vote in the District 3 County Council election. None of the affidavits upon which Greene relies claim that any of these voters requested a challenge ballot and were refused. Greene claims, however, that S.C. Code Ann. §7-13-810 (Supp. 1993) requires the poll manager to issue a challenge ballot when the voter questions the district to which the voter is assigned on the precinct voter registration roll.

S.C.Code Ann. § 7-13-810 (Supp.1993) provides in pertinent part as follows:

> The managers of election shall prevent any person from voting when they have good reason to believe the person has already voted. They should refuse to allow any person to vote who is not a registered elector or who has become disqualified for any cause to vote in such voting precinct...*Any elector or qualified watcher may, and it shall be the duty of the managers of the election to, challenge the vote of any person who may be known or suspected not to be a qualified voter....* The manager shall then present such challenge to the voter and act in accordance with the provisions provided for in this section. All challenges must be made before the time a voter receives a paper ballot or enters into a voting machine and no challenge may be considered

after that time.

Id. [Emphasis added].

The South Carolina Election Commission contends something more is required before the poll manager must issue a challenge ballot. We agree. S.C. Code Ann. § 7-13-830 (Supp. 1993) provides is pertinent part as follows:

> When any person is so challenged the manager shall explain to him the qualifications of an elector and may examine his [sic] as to the same; and if the person *insists* that he is qualified and the challenge is not withdrawn, his vote shall be received and placed in an envelope on which shall be written the name of the voter and that of the challenger.

"The elementary and cardinal rule of statutory construction is that the Court 'ascertain and effectuate actual intent of the legislature.'" *Horn v. Davis Elec. Constructors, Inc.*,307 S.C. 559, 563, 416 S.E.2d 634,636 (1992) [internal citations ommitted]. Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. *Bell v. South Carolina State Highway Dept.*, 204 S.C. 462,467,30 S.E.2d 65,67, (1944). While we recognize the apparent mandatory language of S.C. Code Ann. § 7-13-810 (Supp. 1993), to read the statute as urged by Greene would require the poll manager to issue a challenge ballot to

every voter who questioned the voting district listed on the voter registration roll. We do not believe the legislature intended such a result. S.C. Code Ann. §7-13-830 (Supp. 1993) requires the voter or someone on the voter's behalf to "*insist*" on casting a challenge ballot.

"The making of a challenge is essential to the preservation of an adequate record upon which appellate review can be had." *Fielding v. South Carolina Election Commission*, 305 S.C. 313, 318, 408 S.E. 2d 232,235 (1991). Requiring the voter to insiston a challenge ballot at the poll preserves the record and prevents after-the-fact challenges to otherwise proper elections. The purpose of S.C. Code Ann. § 7-13-710, et. seq. is to assure the orderly and fair election of our public officials. Adopting Mr. Greene's interpretation of the Act would frustrate rather than further the legislative goal. Under the interpretation of the Act urged by Mr. Greene, affidavits of voters who did not bother to vote but were unhappy with the results could be collected for an after-the-fact challenge. In order to protect the voter's right to vote and also insure the integrity of the election, the Legislature required that the voter "insist" upon casting a challenge ballot. S.C. Code Ann. § 7-13-830 (Supp.1993). In *Fielding*, we noted that a vote may be challenged by a watcher, elector, or manager. Thus, it was incumbent upon Greene's poll watcher to insist the poll manager issue a challenge ballot to voters who questioned their eligibility to vote in the District 3

election. As in *Hill v. South Carolina Election Commission*, 304 S.C. 15, 403 S.E.2d 309 (1991), the errors in placing voters in districts to which they did not belong were errors that could have been discovered prior to the election. Affidavits of voters who did not insist in voting in the District 3 election simply did not rise to the level of a "challenge" which required the issuance of a challenge ballot under the statute. See *Berry v. Spigner*, 266 S.C. 183, 84 S.E.2d 381 (1954) (affidavit of voter that poll manager cast voter's vote did not constitute challenge).

AFFIRMED.

CHANDLER, A.C.J., FINNEY, MOORE, JJ., and Acting Associate Justice William H. Ballenger, concur.

Appendix D

The Supreme Court of South Carolina
July 13, 1994

James L. Leslie, Jr., Esquire
P.O. Box 327
Irmo, S.C. 29063

RE:Greene v. S.C. Election Commission, et al.

Dear Mr. Leslie;

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing denied.

/s/ A. Lee Chandler	C.J.
/s/ Ernest A. Finney, Jr.	A.J.
/s/ Jean H. Toal	A.J.
/s/ James E. Moore	A.J.

July 13, 1994."

Very truly yours,

Brenda F. Shealy
Deputy Clerk

/bs

CC: The Honorable T. Travis Medlock
The Honorable Edwin E. Evans
The Honorable Treva G. Ashworth
Dwight F. Drake, Esquire
Carey T. Kilton, Esquire
David L. Floyd, Esquire
Robbin Stewart, Esquire

(2)

Supreme Court, U.S.
FILED
NOV 3 1994
OFFICE OF THE CLERK

No. 94-622

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

DOUGLAS GREENE,

Petitioner,

vs.

SOUTH CAROLINA ELECTION COMMISSION, THE SOUTH CAROLINA BOARD OF STATE CANVASSERS, THE AIKEN COUNTY ELECTION COMMISSION, THE AIKEN COUNTY BOARD OF CANVASSERS AND LAWANA R. MCKENZIE,

Respondents.

PETITION FOR CERTIORARI FROM
THE SUPREME COURT OF THE
STATE OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
ATTORNEY GENERAL
TREVA G. ASHWORTH*
DEPUTY ATTORNEY GENERAL
S.C. ATTORNEY GENERAL'S OFFICE
POST OFFICE BOX 11549
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ATTORNEYS FOR SOUTH CAROLINA ELECTION COMMISSION AND SOUTH CAROLINA BOARD OF STATE CANVASSERS
*COUNSEL OF RECORD

BEST AVAILABLE COPY

24 pp

QUESTION PRESENTED

Did the South Carolina Supreme Court properly affirm the decision of the State Board of Canvassers denying Petitioner's protest of a county council election?

PARTIES

Petitioner

Douglas Greene

Respondents

South Carolina Election Commission
South Carolina Board of State Canvassers
Aiken County Election Commission
Aiken County Board of Canvassers
Lawana R. McKenzie

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OPINION BELOW

The Petitioner seeks to appeal a decision of the South Carolina Supreme Court, Greene v. South Carolina Election Commission, 445 S.E.2d 451 (1994). This case is reprinted in Appendix C of Petitioner's Petition for Writ of Certiorari.

JURISDICTION

On June 20, 1994, the South Carolina Supreme Court issued its Order in this case. A Petition for Rehearing was filed on July 1, 1994, and denied on July 13, 1994. On October 7 a Petition for Certiorari was filed in this Court. Jurisdiction has been sought under 28 U.S.C. §1257.

No. 94-622

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

DOUGLAS GREENE,

Petitioner,

vs.

SOUTH CAROLINA ELECTION COMMISSION, THE SOUTH CAROLINA BOARD OF STATE CANVASSERS, THE AIKEN COUNTY ELECTION COMMISSION, THE AIKEN COUNTY BOARD OF CANVASSERS AND LAWANA R. MCKENZIE,

Respondents.

PETITION FOR CERTIORARI FROM
THE SUPREME COURT OF THE
STATE OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner protested an April 27, 1993, special election for a County Council District seat in Aiken, South Carolina. The Petitioner lost by a vote of 623 to his challenger's 628 votes.

Petitioner protested the election and a hearing was held before the Aiken County Board of Canvassers. The County Board denied the protest. The Petitioner appealed this decision to the State Board of Canvassers and a hearing was subsequently held on his appeal. The State Board also denied the protest. The Petitioner then petitioned the South Carolina Supreme Court for a Writ of Certiorari. The South Carolina Supreme Court affirmed the State Board and denied the relief requested by the Petitioner. The Petitioner has now petitioned for Writ of Certiorari to this Court.

SUMMARY OF ARGUMENT

Ten affidavits were introduced at the protest hearing before the County Board of Canvassers of eleven people who stated they thought they were residents of District 3 but did not receive a District 3 ballot. These voters did not receive a District 3 ballot because the registration list, which

is presumed to be valid, stated that they were registered in a district other than District 3.

The South Carolina Supreme Court upheld the election based on state statutory requirements governing the challenging of a ballot.

ARGUMENT

I.

BACKGROUND

The Petitioner seeks a Writ of Certiorari to request this Court to review a decision of the South Carolina Supreme Court regarding an election protest. The Petitioner was an unsuccessful candidate in a special election for a county council seat in Aiken, South Carolina. He protested his loss of the election to the County Board of Canvassers, the State Board of Canvassers and the South Carolina Supreme Court. [1]

---

[1] In South Carolina a protest of a county office is first heard by the county board of canvassers, S.C. Code Ann. §7-17-30

Both of the Boards and the South Carolina Supreme Court were unanimous in upholding the election.

After the election for a county council seat eleven people signed affidavits stating that they were not allowed to vote in the District 3 county council race because the registration list reflected they did not live in District 3. The registration officials gave these individuals ballots for the district in which the registration list indicated they were registered. These eleven voters then all voted the ballot that the registration list indicated was the ballot to which they were entitled. The affidavits do not reflect that these voters requested to vote a challenged ballot.

Under South Carolina law, a poll watch-

(Supp 1993) a decision of the county board may be appealed to the State Board of Canvassers, S.C. Code Ann. §7-17-60 (1976), an petition for certiorari may be taken to the South Carolina Supreme Court from any decision of the State Board, S.C. Code Ann. §7-17-250 (1976).

er may challenge a person's vote necessitating, if the statutory requirements are met, that the vote be voted by way of a challenged ballot. [2] The Petitioner had a poll watcher at the polling place; however, the poll watcher did not request these persons vote a challenged ballot.

The Petitioner has consistently argued that the voters should have voted a challenged ballot and that it was incumbent for the poll managers to give the voters a challenged ballot when the voters believed they lived in a district different from the one in which the registration list indicated they resided. Three hearings have affirmed that under South Carolina law more is required before a challenged ballot should be required to be voted.

---

[2] In South Carolina voting a challenged ballot would require a person to vote a ballot that would be placed in an envelope and retained for a hearing on whether the person had the proper qualifications to vote. S.C. Code Ann. § 7-13-830 (Supp 1993).

Every prospective voter in South Carolina must first register to vote. S.C. Code Ann. §§7-5-120, 7-5-155, 7-5-170 (Supp 1993). The registration form requires the person registering to vote to provide information regarding where he actually resides.

A person once registered is listed on the official registration lists of the county. S.C. Code Ann. §7-5-410 (1976); 29 C.J.S., Elections, §47. Prior to the election the State Election Commission generates a registration list of all the persons registered to vote in each precinct. S.C. Code Ann. §§7-5-420; 7-5-430 (1976). The list is presumed to be conclusive evidence as to who is registered and entitled to vote in each precinct. As is stated in 29 C.J.S., Elections, §49

> [p]ersons who are properly registered are entitled to vote in such elections and over such a period of time as the constitution and statutes permit. A registration list is conclusive evidence as to the fact of registration of those persons whose names appear there-

on. It is at least prima facie evidence of who constitutes the qualified voters.

II.

THE AFFIANTS PROPERLY VOTED UNDER SOUTH CAROLINA LAW.

The present election concerns a County Council election for District 3 in Aiken, South Carolina. The district line for District 3 splits at least one precinct. This split district line has divided this district since 1983 and it was not changed or altered prior to this contested election.

In split precincts voters are often unsure or confused as to the exact district in which they are entitled to vote. Poll managers are not required every time a voter believes he lives in a district other than the one listed on the registration list to offer the person a challenged ballot to vote. The poll managers may properly presume the registration list is valid and follow it.

A challenge to a voter in South Carolina has a specific statutory meaning and occurs only in certain specified situations as set out by statute. Two South Carolina statutes primarily govern challenged ballots, S.C. Code Ann. §§7-13-810 and 7-13-830 (Supp 1993). S.C. Code Ann. §7-13-810 (Supp 1993) provides in pertinent part that

> [t]he managers of election shall prevent any person from voting when they have good reason to believe the person has already voted. They shall refuse to allow any person to vote who is not a registered elector or who has become disqualified for any cause to vote in such voting precinct. ... Any elector or qualified watcher may, and it is the duty of the managers of the election to, challenge the vote of any person who may be known or suspected not to be a qualified voters. ... The manager shall then present the challenge to the voter and act in accordance with the provisions provided for in this section.

S.C. Code Ann. §7-13-830 (Supp 1993) sets out the procedure to be followed when a voter is challenged.

> When any person is so challenged, the manager shall explain to him

> the qualifications of an elector and may examine his as to the same. If the person insists that he is qualified and the challenge is not withdrawn, his vote must be received and placed in an envelope on which must be written the name of the voter and that of the challenger.

There are therefore, three statutory grounds to challenge a voter; i.e., that the voter has previously voted in the election, that he is not a registered elector, or, that he has become disqualified.

The eleven voters who signed affidavits in this case were informed that according to the registration list they resided in a district other than District 3. Order, S.C. Supreme Court, Appendix C of Petition for Writ of Certiorari, p. 9. These eleven voters to a person all then voted the ballot that the registration list indicated was the ballot to which they were entitled. " None of the affidavits ... claim that any of these voters requested a challenge ballot and were refused." Order, S.C. Supreme

Court, Appendix C of Petition for Writ of Certiorari, p. 11. The poll watchers for the Libertarian Party who observed these events did not challenge the voter not being issued a District 3 ballot and insist that the voters be allowed to vote a challenged ballot. Order, S.C. Supreme Court, Appendix C of Petition for Writ of Certiorari, p. 13. The voters, themselves, did not insist upon a District 3 ballot. Order, S.C. Supreme Court, Appendix C of Petition for Writ of Certiorari, p. 14. The poll manager did not challenge and would not have challenged the voter being given a ballot for District 3 because the ballot the voter received was consistent with the information reflected on the registration list. In the poll manager's view the voter was being given the proper ballot as was reflected on the registration list. As the South Carolina Supreme Court stated

> [r]equiring the voter to insist on a challenge ballot at the poll

preserves the record and prevents after-the-fact challenges to otherwise proper elections. The purpose of S.C. Code Ann. §7-13-710, et. seq. is to assure the orderly and fair election of our public officials. Adopting Mr. Greene's interpretation of the Act would frustrate rather than further the legislative goal. Under the interpretation of the Act urged by Mr. Greene, affidavits of voters who did not bother to vote but were unhappy with the results could be collected for an after-the-fact challenge. In order to protect the voter's right to vote and also insure the integrity of the election, the Legislature required that the voter 'insist' upon casting a challenge ballot. S.C. Code Ann. §7-13-830 (Supp. 1993). ... a vote may be challenged by a watcher, elector, or manager. Thus, it was incumbent upon Greene's poll watcher to insist the poll manager issue a challenge ballot to voters who questioned their eligibility to vote in the District 3 election. As in Hill v. South Carolina Election Commission, 304 S.C. 15, 403 S.E.2d 309 (1991), the errors in placing voters in districts to which they did not belong were errors which could have been discovered prior to the election. Affidavits of voters who did not insist in voting in the District 3 election simply did not rise to the level of a 'challenge' which required the issuance of a challenge ballot under the statute. See, Berry v. Spigner, 266 S.C.

> 183, 84 S.E.2d 831 (1954) (affidavit of voter that poll manager cast voter's vote did not constitute challenge).

Appendix C of Petition for Writ of Certiorari, pp. 13-14.

III.

THE CASE WAS DECIDED UNDER SOUTH CAROLINA LAW GOVERNING ELECTIONS.

The South Carolina Supreme Court resolved this case purely under State law. The Court did not discuss or decide a federal question nor did it even cite a federal statute. Only the Petitioner has raised the provisions of the Voting Rights Act as grounds for his continuing protest of this election.

The standard of review for a decision of the State Board to be overturned on appeal was set out in the South Carolina Supreme Court Order below as

> [t]he scope of appellate review of the State Board's order 'is limited to corrections of errors of law; findings of fact will not be overturned unless wholly unsupported by the evidence.' Knight v. State Board of Canvassers, 297

> S.C. 55, 57, 374 S.E.2d 685 (1988); Simms v. Hamm, 275 S.C. 369, 271 S.E.2d 316 (1980); Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 381 (1954). Every reasonable presumption in favor of sustaining a contested election will be employed and irregularities or illegalities which do not appear to have affected the result of the election will not be allowed to overturn it.

Appendix C of Petition for Writ of Certiorari, p. 10.

In a protest of an election, in order to overturn the election in South Carolina, the State Board must be presented with evidence that an error or irregularity occurred, Hyde v.Boykin, 101 S.E.2d 41 (1919); Berry, supra, Fielding v. South Carolina Election Commission, 408 S.E.2d 232 (1991), and, that the error affected the result; Berry, supra. The State Board found that this burden had not been met. The South Carolina Supreme Court agreed. [3]

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[3] The South Carolina Supreme Court did not discuss the standard of review under the United States Constitution as this case was decided under State law.

The Petitioner alleges that the election officials violated various provisions of the South Carolina Constitution, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the Voting Rights Act. (Petition, pp. 23-26)

The election was regularly conducted under the laws of South Carolina, both statutory and constitutional. The poll managers did not apply a "test or device" nor did the poll managers deny a voter the right to vote.

The Voting Rights Act provides that

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....

42 U.S.C. §1973 (a).

Section 1973b (a) (1) assures

> ... that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State ....

A "test or device" is defined at 42 U.S.C. §1973b (c) as

> ... any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

The Voting Rights Act by its very provisions is not applicable to the factual situation presented by this case in that the voters were not subjected to a test or device as defined in 42 U.S.C. §1973b (c).

CONCLUSION

The Respondent would respectfully request that the petition for Certiorari be denied.

Respectfully submitted,

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Columbia, South Carolina

November 3, 1994.

FILED
NOV 4

No. 94-622

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DOUGLAS GREENE
. . . . . Petitioner

V.

SOUTH CAROLINA ELECTION COMMISSION, THE SOUTH CAROLINA BOARD OF STATE CANVASSERS, THE AIKEN COUNTY ELECTION COMMISSION, THE AIKEN COUNTY BOARD OF CANVASSERS AND LAWANA R. MCKENZIE
. . . . . Respondents

PETITION FOR CERTIORARI TO
THE UNITED STATES SUPREME COURT FROM THE
SOUTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

I. DID THE SOUTH CAROLINA STATE SUPREME COURT AND THE SOUTH CAROLINA BOARD OF STATE CANVASSERS CORRECTLY APPLY STATE LAW AND UPHOLD THE ELECTION RESULTS?

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OPINIONS AND JUDGMENTS BELOW

The South Carolina Supreme Court, on June 20, 1994 affirmed the South Carolina Board of State Canvassers June 15, 1993 decision sustaining the election results of the April 27, 1993 Aiken County Council District 3 election results.

The opinion of the South Carolina Supreme Court is a published opinion, Douglas Greene v. South Carolina Election Commission, The South Carolina Board of State Canvassers, The Aiken County Election Commission, The Aiken County Board of Canvassers and Lawana R. McKenzie, No. 24101 (June 20, 1994), and is found in Appendix C of petitioner's Petition for Writ of Certiorari, at pp. 8-14.

The Order of the State Board of Canvassers is not separately published, but has been set out in Appendix B of petitioner's Petition for Writ of Certiorari at pp. 2-7. The State Board of Canvassers affirmed the Order of Aiken County Registration and Election Commission which was

rendered May 6, 1993, which sustained the election results. The Aiken County Registration and Election Commission Order is found in Appendix A of petitioner's Petition for Writ of Certiorari, at p. 1.

The petitioner's Petition for Rehearing was denied by the South Carolina Supreme Court on July 13, 1994. The Order denying the Petition for Rehearing is found in Appendix D of petitioner's Petition for Writ of Certiorari, at p. 15.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257. The South Carolina Supreme Court grounded its opinion solely on a construction of state election law, and not on a federal question. As this Court has consistently ruled, when, "as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state court, unless the aggrieved party in this court can affirmatively show the contrary." Street v. New York, 394 U.S. 576 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); Chicago, I.L.R. Co. v. McGuire, 196 U.S. 128, 131-133 (1905). In such cases, this Court lacks jurisdiction to consider the issues raised. See Id. The decision below does not decide an important question of federal law which has not been but should be settled by this Court. This Court should deny the Petition for Writ of Certiorari filed by the petitioner.

STATEMENT OF THE CASE

In this election, Respondent Lawana R. McKenzie defeated Petitioner Douglas Greene for the District 3 seat on the Aiken County Council. Petitioner, the Libertarian candidate, has on three separate occasions sought unsuccessfully to overturn the results of that election. In the first instance, the Aiken County Board of Canvassers (hereinafter "County Board") ruled on May 6, 1993 that there was "insufficient evidence of election law violations." Appendix A (hereinafter "State Order"). On appeal, after reviewing the record, considering all arguments, and soliciting additional testimony from election officials, the South Carolina Board of State Canvassers, (hereinafter "State Board"), ruled on June 15, 1993 that: (1) the record was sparse, with none of the eleven voters submitting affidavits having testified; (2) "no challenged ballots were cast" in the election; and (3) under South Carolina law, the Appellant "failed to meet the burden of proof" and also failed to

demonstrate that the alleged errors "would affect the outcome of the election." Appendix, Exhibit B, State Order at 2. Thereafter, on appeal to the South Carolina Supreme Court, that Court ruled, after reviewing the record and fully considering the arguments of the parties, affirmed the decision of the State Election Board and ruled that "It was incumbent upon Greene's pollwatcher to insist the poll manager issue a challenge ballot to voters who questioned their eligibility to vote . . . . the errors in placing voters in districts to which they did not belong were errors which could have been discovered prior to the election. Affidavits of voters who did not insist in voting . . . simply did not rise to the level of a 'challenge' ballot under the statute." Appendix C, pp. 13-14.

SUMMARY OF THE ARGUMENT

The petitioner failed to sustain his burden in producing any evidence that the voters at issue insisted in voting in District 3 and were refused a challenge ballot. Any error in placing voters in districts to which they did not belong were errors that could have been discovered prior to the election, and such does not rise to the level of a Constitutional or Federal Voting Rights violation.

ARGUMENT

I. THE DECISION OF THE SOUTH CAROLINA SUPREME COURT AND THE STATE AND COUNTY BOARDS SHOULD BE SUSTAINED: THE ELECTION RESULTS OF THE AIKEN COUNTY COUNCIL ELECTION SHOULD BE UPHELD.

A. The South Carolina Supreme Court Applied the Correct Legal Standard: Its Decision is Well-Founded on State Law Grounds.

Appeals from the South Carolina State Board of Canvassers may be taken to the South Carolina Supreme Court on a writ of certiorari "only based on the record of the State Board." S.C. Code Ann. § 7-17-270 (1992); see also Sims v. Ham, 275 S.C. 369, 370, 271 S.E.2d 316, 317 (1980) (ruling that Supreme Court's scope of review of decisions of State Board is "limited to correcting errors of law"); Redfearn v. Board of State Canvassers of S.C., 234 S.C. 113, 107 S.E.2d 10 (1959)(same). Unless the findings of fact of the State Board are wholly unsupported by the

evidence, the South Carolina Supreme Court will not review the State Board's findings of facts. Id.

Moreover, it is well-settled in South Carolina that a court will use "every reasonable presumption" in favor of sustaining a contested election. Fielding v. South Carolina Election Com'n, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991); Knight v. State Bd. of Canvassers, 297 S.C. 55, 56, 374 S.E.2d 685, 686 (1988). Accordingly, when there is a choice between two inferences, the choice must be made in favor of the validity of the contested election. Trapp v. South Carolina Bd. of State Canvassers, 273 S.C. 163, 169, 255 S.E.2d 670, 673 (1979). The results of an election will be upheld unless the challenger establishes that the alleged election errors "actually appear to have affected the result of the election." Id. See also Drawdy v. South Carolina Democratic Executive Committee, 271 S.C. 415, 247 S.E.2d 806 (1978). Mere "conjecture, speculation, and surmise"

that election irregularities occurred will not suffice. Fielding, 305 S.C. 313, 318, 408 S.E.2d 232, 235.

The South Carolina Supreme Court in accordance with the above legal principles, sustained the election results of the April 27, 1993 Aiken County Council election. It's decision is well-founded on state law grounds.

B. Petitioner Failed to Sustain His Burden.

In Berry v. Spigner, the South Carolina Supreme Court considered whether the losing party had sustained his burden in an election contest. 226 S.C. 183, 190 84 S.E.2d 381, 382 (1954). As in the present case, the protestant in Berry challenged the election results arguing that the managers of the election had allowed certain irregular acts which allegedly affected the outcome of the election. Protestant submitted affidavits to that effect. Id.

In Berry, both the county and state boards found that the protestant had failed to sustain his burden in the election contest. Id. On writ of certiorari, the South Carolina

Supreme Court reviewed the affidavits in detail. 226 S.C. at 187, 188, 84 S.E.2d at 383. These consisted of eleven submissions in which affiants stated facts such as the following: that "on at least 75 to 100 instances" or that with regard to at "least half of the voters," the managers of the election went into voting booths of voters who did not appear to need assistance. Other affiants stated that the election managers accompanied them into the voting booth, and did not allow them to vote for the desired candidate or suggested a candidate for whom to vote. Id. After reviewing the affidavits and the record as a whole, the Court ruled that because of the indefiniteness of the evidence presented, the state and county's actions in sustaining the election results were warranted. Accordingly, the Court sustained the election.

In the instant case, Petitioner submitted 10 affidavits for 11 people. These affidavits are inconclusive. All the affidavits state that the voters presented themselves at the

polls but the poll manager did not allow them to vote in the District 3 County Council election. Appendix C, p. 9. All of the voters were set forth on the official registration roll as eligible to vote in District 2. Id. None of the voters were listed as eligible to vote in District 3. Id. The voters were allowed to vote in the precinct election, but were not allowed to vote in the District 3 county council election. The affidavits do not state that the affiants requested a challenged ballot nor that they were refused a challenged ballot. Id. at 11.

Without more, the South Carolina Supreme Court was compelled to draw all reasonable inferences in favor of sustaining the election results, and did so. As in Berry v. Spigner, supra, the evidence submitted by Appellant by affidavit in the present case is so indefinite that the State Supreme Court's decisions to sustain the election results were warranted.

Petitioner claimed that section 7-13-810 requires the poll manager to issue a challenge ballot when a voter questions the district to which the voter is assigned. See S.C. Code Ann. § 7-13-810. Petitioner is mistaken. As both the South Carolina Election Commission and the South Carolina Supreme Court ruled, in construing this state election law, before issuing a challenge ballot, something more is required. Appendix B at 4; Appendix C at 12. Section 7-13-830 of the South Carolina Code provides in pertinent part that, after the poll manager explains elector qualifications to the voter, "if the person insists he is qualified and the challenge is not withdrawn, his vote shall be received and placed in an envelope on which shall be written the name of the voter." S.C. Code Ann. § 7-13-830 (Law. Co-op 1976 & Supp. 1983).

As the Supreme Court ruled, petitioner's urged construction of state election law would allow voters unhappy with an election result after-the-fact to provide

affidavits for an after-the-fact challenge. Appendix C at 13. On the other hand to require, as the legislative framework does, for all challenges to be made before-the-fact insures the integrity of elections and safeguards the rights of voters. Id.

The South Carolina Supreme Court concluded it was incumbent upon Petitioner's pollwatchers to "challenge the vote of any person who may be known or suspected not to be a qualified voter. . . . " S.C. Code Ann. § 7-13-830. They did not do so. Appendix C, at 13. See also Fielding v. South Carolina Election Com'n, 305 S.C. 313, 318, 408 S.E.2d 232, 235 (1991)(the "making of a challenge is essential to an adequate preservation of an appellate record upon which appellate review can be had.") Petitioner's pollwatchers did not challenge the ballots of any voters. Accordingly, despite Petitioner's assertions after-the-fact that none of the voters were issued challenged ballots, the duty to challenge ballots rested squarely on petitioner's

pollwatchers. Furthermore, as the South Carolina Supreme Court declared in Hill v. South Carolina Election Comm'n, 304 S.C. 150, 403 S.E.2d 309 (1991),

> The discrepancies between the district where a voter actually resided and the district designation on the voter registration lists could have been discovered prior to the election. Further, we see no reason why a challenge could not have been made at the time a voter was given a ballot for a different district than the one which appeared on the registration list.
>
> The reason for requiring a contemporaneous challenge to a ballot is made clear by the conclusion of the State Board that it could not assume that the forty persons identified as being registered to vote in the wrong district were all actually given correct ballots at the polls. Had a challenge been raised . . . at the time a ballot was dispensed, there would be no need to make assumptions of any kind, since the challenged ballot would have been segregated and a record made of the determination of the challenge.

304 S.C. at 152, 403 S.E.2d at 310 (emphases added). Having failed to take the necessary steps to document the

record at the time the ballots were being cast, the evidence in the record is indefinite at best.

In fully considering the record and argument of the parties, and applying settled principles of state election law, the South Carolina Supreme Court properly concluded that petitioner had not sustained his burden. The state court, therefore, sustained the election results.

II. THE ACTIONS COMPLAINED OF DO NOT VIOLATE THE SOUTH CAROLINA OR FEDERAL CONSTITUTIONS NOR THE VOTING RIGHTS ACT.

As set forth under the jurisdictional section of this brief, it is doubtful that this Court has jurisdiction of this matter as the South Carolina Supreme Court grounded its decision to sustain the election results solely on the construction of state law, and not upon a federal question. Illinois v. Gates, 462 U.S. 213 (1983); Street v. New York, supra; Chicago & L.R. Co. v. McGuire, supra.

Petitioner alleges, inter alia, that election officials' interpretation of the challenge ballot statute violated South Carolina Constitution Article I, Sections 1, 3 and 5; Article 2 Sections 1, 2, and 4; the Federal Voting Rights Act; and, the United States Constitution. Petitioner's Brief at 23-24. Contrary to petitioner's assertion, there is no evidence in the record of such violations. Rather, there is evidence that the April 27, 1993 Aiken County Council election was regularly conducted under the laws of this State, and that the poll managers did not deny any voter a right to vote. As the South Carolina Supreme Court declared, "In order to protect the voter's right to vote and also insure the integrity of the election, the Legislature required the voter 'insist' upon casting a challenge ballot." Appendix C at 13. Accordingly, the state court concluded that the poll managers acted appropriately.

The alleged actions of the poll managers do not constitute a "test or device" as defined by the Federal Voting

Rights Act. See 42 U.S.C. § 1973b(c). The Voting Rights Act was not violated by virtue or the events alleged by petitioner. Petitioner's claims of constitutional violations are equally unfounded.

CONCLUSION

The South Carolina Supreme Court properly ruled on petitioner's claims. Based on all the foregoing, as well as the argument and law set forth in the Brief in Opposition submitted on behalf of the State of South Carolina, respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

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